Current Circuit Splits

The following pages contain brief summaries of circuit splits identified by federal court of appeals opinions announced between September 4, 2014 and February 18, 2015. This collection, written by the members of the *Seton Hall Circuit Review*, is organized into civil and criminal matters, and then by subject matter and court.

Each summary briefly describes a current circuit split, and is intended to give only the briefest synopsis of the circuit split, not a comprehensive analysis. This compilation makes no claim to be exhaustive, but aims to serve the reader well as a referential starting point.

Preferred citation for the summaries below: *Circuit Splits*, 11 SETON HALL CIR. REV. [n] (2015).

CIVIL MATTERS

CIVIL

CIVIL PROCEDURE

Certification – Class Actions: *Shelton v. Bledsoe*, 2015 U.S. App. LEXIS 253 (3d Cir. Jan. 7, 2015)

The 3rd Circuit addressed whether, for the purposes of Federal Rule of Civil Procedure 23(b)(2), the identities of members of a class must be ascertainable. *Id.* at *8. The court noted that the 1st and 10th Circuits rejected any "ascertainability" requirement for the purpose of Rule 23(b)(2) classes. *Id.* at *14. The court recognized that the 2nd Circuit certified classes that were likely unascertainable without addressing the issue. *Id.* The court further noted that the Fifth Circuit tied the issue of "ascertainability" to the type of relief sought, striking a middle ground. *Id.* at *16. The court agreed with the 5th Circuit, and reasoned that Rule 23(b(2) class actions are indivisible, and organized specifically for certain types of relief, specifically injunctions or declaratory judgments. *Id.* at *11. Thus, the 3rd Circuit concluded that it was not necessary for a class seeking declaratory or injunctive relief to be ascertainable. *Id.* at *17–18.

Removal Procedure – Class Action: *Romulus v. CVS Pharm. Inc*., 770 F.3d 67 (1st Cir. 2014)

The 1st Circuit addressed the proper interpretation of removal time periods under the Class Action Fairness Act of 2005, 28 U.S.C. § 1446(b)(3). The court found, based on the text of the statute, that when removability is not clear from the initial pleading, section 1446(b)(3) requires that the defendant look to the plaintiffs' subsequent papers to

determine whether the "removal clocks" have been triggered. *Id*. at 74. The court acknowledged that several circuits have adopted a bright-line test, but each differed in their application. *Id*. Both the 7th and 2nd Circuits limited the inquiry to the contents of the plaintiff's complaint or later paper. *Id*. at 74–75. The court noted that, where the 7th Circuit found that a plaintiff must specifically disclose the amount of monetary damages sought in order to trigger § 1446(b)'s deadlines, the 2nd Circuit allowed a plaintiff to trigger the removal deadlines by either explicitly stating an amount or setting forth facts from which an amount in controversy in excess of $5,000,000 can be ascertained. *Id*. In adopting the 2nd Circuit's approach the court found that the thirty-day time under 28 U.S.C.S. § 1446(b)(3) was triggered only when the plaintiffs' complaint or plaintiffs' subsequent paper provides the defendant a clear statement of the damages sought or with sufficient facts from which damages can be readily calculated. *Id*. at 69–70.

Subject Matter Jurisdiction – Securities and Exchange Act of 1934 § 27: *Manning v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 772 F.3d 158 (3d Cir. 2014)

The 3rd Circuit addressed "whether the exclusive jurisdiction provision in § 27 of the Securities Exchange Act of 1934 . . . provide[s] a more expansive basis for federal-question jurisdiction." *Id*. at 165–66. The court noted that the 2nd Circuit found that where the court has determined that a plaintiff's state law claim does not arise under 28 U.S.C. § 1331 federal-question jurisdiction, federal jurisdiction cannot alternatively be created under § 27, because § 27 "plainly refers to claims created by the Act or by rules promulgated thereunder, but not to claims created by state law." *Id*. at 166. Conversely, the 9th Circuit held that for claims raised under § 27, it is immaterial whether those claims arose under § 1331 because § 27 creates a more expansive basis for federal-question jurisdiction. *Id*. The 3rd Circuit joined the 2nd Circuit and concluded that the exclusive jurisdiction provision in § 27 does not provide for an independent basis of jurisdiction. *Id*. at 167–68.

CIVIL RIGHTS

Standing – The Rehabilitation Act of 1973: *McCullum v. Orlando Reg'l Healthcare Sys.*, 768 F.3d 1135 (11th Cir. 2014)

The 11th Circuit addressed whether the scope of the Rehabilitation Act of 1973 ("RA") grants standing to non-disabled persons. *Id*. at 1142. The 11th Circuit recognized that the 2nd Circuit has broadly interpreted

standing under the RA. *Id*. at 1144. The 2nd Circuit held that "non-disabled plaintiffs were aggrieved within the meaning of 29 U.S.C.S. § 794a(a)(2) so long as they could show 'an independent injury casually related to the denial of federally required services to the disabled persons with whom [they] are associated" and that prior 2nd Circuit precedent interpreted associational standing "as broadly as possible under the Constitution, irrespective of § 794(a)." *Id*. The 11th Circuit disagreed with the 2nd Circuit and found that a party is "aggrieved" within the meaning of § 794a(a)(2) only if she is personally excluded, denied benefits, or discriminated against because of her association with a disabled person" and the associational standing provision should not be interpreted "irrespective of [the language of § 794(a)]." *Id.* Thus, the 11th Circuit concluded that non-disabled plaintiffs lack standing to sue under the RA. *Id*. at 1145.

Statutory Interpretation – Civil Rights Act of 1991: *Brown v. Sessoms*, 774 F.3d 1016 (D.C. Cir. 2014)

The Court of Appeals for the District of Columbia Circuit addressed whether *Jett v. Dallas Independent School District*, 491 U.S. 701(1989) determined that the express action at law provided by 42 U.S.C.S. § 1983 advances the exclusive federal damages remedy for the violation of the rights guaranteed by 42 U.S.C.S. § 1981 when the claim is pressed against a state actor. *Id*. at 1021. The court noted that 9th Circuit determined that the Civil Rights Act of 1991 overruled *Jett*. *Id*. Yet, the court agreed with the 3rd, 4th, 5th, 6th, 7th, 10th, and 11th Circuits in finding that that *Jett* remains good law, and consequently, that § 1983 remains the exclusive remedy for violations of § 1981 committed by state actors. *Id.* The court reasoned that if Congress had intended to nullify *Jeff*, the Civil Rights Act and its legislative history would have named it alongside several Supreme Court decisions included in the Civil Rights Act, which the Civil Rights Act is intended to overrule. *Id*. Nonetheless, *Jett* was not identified even though it was decided less than two years before Congress acted, and thus, the court concluded that the Civil Rights Act of 1991 did not overrule *Jett*. *Id*. at 1022.

EMPLOYMENT LAW

Employment Retirement Income Security Act – Finality of Remand Orders: *Mead v. Reliastar Life Ins. Co.*, 768 F.3d 102 (2d Cir. 2014)

The 2nd Circuit addressed whether plan administrator remand orders under the Employment Retirement Income Security Act ("ERISA") are considered final decisions subject to appeal. *Id*. at 107. The court noted

that the majority of circuits, including the 1st, 4th, 6th, 8th, and 11th Circuits, have held that "because an ERISA remand order contemplates further proceedings before the plan administrator, it is not 'final' and therefore may not be immediately appealed." *Id*. However, the 3rd, 9th, and 10th Circuits held that these remand orders are final. *Id*. The 7th Circuit, standing alone, has analyzed the "finality of ERISA remand orders by reference to the statute governing remands to the Social Security Administration," found at 42 U.S.C. § 405(g). *Id*. After analyzing prior case law and the various approaches taken by its sister circuits, the 2nd Circuit joined the 1st, 4th, 6th, 8th, and 11th Circuits and held that plan administrator remand orders are generally not final and therefore should not be subject to appeal. *Id*. at 109.

EMPLOYMENT LAW

Fair Labor Standards Act–Pleadings: *Landers v. Quality Communs., Inc.*, 771 F.3d 638 (9th Cir. 2014)

The 9th Circuit addressed the "degree of specificity required to state a claim for failure to pay minimum wages or overtime wages under the [Fair Labor Standards Act (FLSA)]" in light of *Twombly* and *Iqbal*. *Id*. at 640. The court noted that the 1st, 2nd, and 3rd Circuits determined that "in order to survive a motion to dismiss, a plaintiff asserting a claim to overtime payments must specifically allege that she worked more than forty hours in a given workweek without being compensated for the overtime hours worked during that workweek." *Id*. at 644-45. Conversely, the 11th Circuit found that in order to state a plausible claim for relief, the plaintiff need only state that the employer in question violated the FLSA by failing to pay minimum hourly wages and failing to pay overtime in hours worked over 40 hours." *Id.* at 645. The 9th Circuit joined the 1st, 2nd, and 3rd Circuits and held that "detailed factual allegations regarding the number of overtime hours worked are not required to state a plausible claim . . . [but] conclusory allegations that merely recite the statutory language are [not] adequate." *Id*. at 644.

IMMIGRATION LAW

Immigration and Nationality Act – Waiver of Inadmissibility: *Husic v. Holder*, 2015 U.S. App. LEXIS 264 (2d Cir. Jan. 8, 2015)

The 2nd Circuit addressed whether an alien who lawfully entered the country without lawful permanent resident (″LPR″) status but later adjusted to LPR status is eligible to seek a waiver of inadmissibility under

the Immigration and Nationality Act (INA) § 212(h). *Id.* at *2. The court rejected the 8th Circuit's interpretation that an alien is "lawfully admitted for permanent residence" when he obtains LPR status following an approval of application for adjustment. *Id.* at *8–9. The court reasoned that because the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), expressly defined "admitted" to mean "[t]he lawful entry of the alien into the United States after inspection and authorization by an immigration officer,″ that adjustment of status was not contemplated and therefore not relevant to "lawful entry." *Id. at* *12–13. The court joined seven sister Circuits to find that when an alien is admitted into the United States as a visitor, but later attains LPR status by adjustment, then the alien is not "an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence." *Id.* at *1. The court concluded that such an alien is eligible to seek a waiver under INA § 212(h) if the Attorney General chooses to exercise favorable discretion. *Id*. at *1,*6, *15–17.

PRIVATE RIGHT OF ACTION

Investment Company Act of 1940 – Factors for determining whether a statute grants a private right of action: *Laborers' Local 265 Pension Fund v. iShares Trust*, 769 F.3d 399 (6th Cir. 2014)

The 6th Circuit addressed "whether § 36(a) of the [Investment Company Act of 1940 ("ICA")] provides an implied private right of action." *Id.* at 406. The court noted that, while a circuit split does exist as to this issue, all of the circuit courts that have decided this issue in the wake of the Supreme Court's decision in *Alexander v. Sandoval*, 532 U.S. 275 (2001), have held that "an implied private right of action does not exist." *Id*. In interpreting the Supreme Court's decision, the 6th Circuit determined that the threshold question is "whether the text or the structure of the ICA indicates an intent by Congress to create an implied private right of action under § 36(a)." *Id*. at 407. In analyzing the plain language of the Act, specifically the first sentence of § 36(a) which states "[t]he commission is authorized to bring an action . . . " and the fact that § 36(b) expressly creates a private right of action, court concluded that "neither the text nor the structure of the ICA demonstrates an intent by Congress to provide an implied private right of action under § 36(a)." *Id*. at 408.

CRIMINAL

CONSTITUTIONAL LAW

First Amendment – Freedom of Speech: *United States v. Heineman*, 767 F.3d 970 (10th Cir. 2014)

The 10th Circuit addressed whether 18 U.S.C. § 875(c), as construed in *Virginia v. Black et al.*, 538 U.S. 343 (2003), "requires the government to prove in any true-threat prosecution that the defendant intended the recipient to feel threatened." *Id*. at 975. The 10th Circuit recognized that the 7th and 9th Circuits have embraced a "natural reading" of *Black*'s definition of true threats. *Id*. at 979. Consequently, like the 7th and 9th Circuits, the 10th Circuit interpreted *Black* as establishing that a defendant can be "constitutionally convicted of making a true threat only if the defendant *intended* the recipient of the threat to feel threatened." *Id.* at 978. The 10th Circuit disagreed with the 1st, 3rd, 4th, 6th, 8th, and 11th Circuits, which all declined to read *Black* as "imposing a subjective-intent requirement." *Id.* The 10th Circuit read *Black* as imposing a subjective-intent requirement. *Id*. Thus, the 10th Circuit concluded that lower courts must determine whether the defendant "intended to instill fear before it could convict him of violating § 875(c)." *Id.* at 981–82.

First Amendment: Freedom of Speech: *iMatter Utah v. Njord*, 2014 U.S. App. LEXIS 24164 (10th Cir. Dec. 22, 2014)

The 10th Circuit addressed whether "the government must exempt indigent applications from otherwise-constitutional permit requirements that they cannot afford." *Id*. at 1264. The court recognized that the 3rd and 11th Circuits have held "that permits for First Amendment Activity cannot be conditioned on the applicant's ability to pay." *Id*. However, the court also noted that the 1st and 6th Circuits held "that no indigency waiver is required, at least where there remain ample alternative forums for the speech." *Id*. The 10th Circuit agreed with the 1st and 6th Circuits, and held that "the Constitution does not mandate an indigency exception to an otherwise-valid permit requirement" so long as ample alternative forums for speech exist. *Id*.

Sixth Amendment – Tribal court convictions: *United States v. Bryant,* 769 F.3d 671 (9th Cir. 2014)

The 9th Circuit addressed whether, in a prosecution under 18 U.S.C.S. § 117(a), the government may use prior tribal court convictions

that were obtained in the absence of counsel. *Id*. at 673. The court noted that the 8th and 10th Circuits held that "a prior uncounseled tribal court conviction could be used as a predicate offense for a § 117(a) prosecution" because the Sixth Amendment does not apply in tribal court and thus using a tribal court conviction in a subsequent prosecution cannot violate the Sixth Amendment. *Id*. at 678. The court further noted that 9th Circuit's previous ruling in *United States v. Ant*, 882 F.2d 1389 (9th Cir. 1989) contradicted the views of the 8th and 10th Circuits. *Id*. The 9th Circuit reaffirmed its holding in *Ant* that the government may not rely on tribal court convictions as predicate offenses in § 117(a) prosecutions unless the tribal court afforded the same right to counsel as guaranteed by the Sixth Amendment in federal and state prosecutions. *Id*. at 679. Thus, the 9th Circuit followed its prior precedent, which prohibits the use of tribal court convictions in §117(a) prosecutions. *Id*.

CRIMINAL PROCEDURE

Acts and Mental States – Mens Rea in Making Threats: *United States v. Heineman*, 767 F.3d 970 (10th Cir. 2014)

The 10th Circuit addressed whether "the First Amendment, as construed in [*Virginia v. Black*, 538 U.S. 343 (2003)], require[s] the government to prove in any true-threat prosecution that the defendant intended the recipient to feel threatened." *Id*. at 975. The court considered varying interpretations of language used in *Black*, noting that the 9th and 7th Circuits determined that there is a subjective intent requirement, while the 1st, 3rd, 4th, 6th, 8th, and 11th Circuits declined to apply a subjective intent analysis. *Id*. at 979. The 10th Circuit agreed with the 9th Circuit, reasoning that subjective intent must be required, as it "was the [Supreme] Court's view that a threat was unprotected by the First Amendment only if the speaker intended to instill fear in the recipient." *Id*. at 980. The court reasoned that, if subjective intent was not required, the *Black* majority would not have used subjective intent as a basis for invalidating the statute at issue. Id. In doing so, the court rejected the opposing circuits' argument that the language in *Black* contained any ambiguity about what a speaker must intend. *Id*. Rather, the 10th Circuit ultimately concluded that, "a defendant can be constitutionally convicted of making a true threat only if the defendant intended the recipient of the threat to feel threatened." *Id*. at 978.

Habeas Corpus – Statutory Time Bar: *Ezell v. United States,* 2015 U.S. App. LEXIS 1067 (9th Cir. Jan. 23, 2015)

The 9th Circuit addressed whether the gatekeeping procedures in 28 U.S.C. § 2244(b)(3)(D) are mandatory or hortatory when considering second or successive 28 U.SC. § 2255 habeas corpus petitions. *Id.* at *5. The court noted that the 1st, 4th, 6th, 7th and 10th Circuits have held the time limit is hortatory, while the 11th Circuit considers this provision mandatory. *Id.* The 9th Circuit agreed with the 1st, 4th, 6th, 7th and 10th Circuits and held that when a when a § 2255 motion presents a complex issue, the court may exceed the thirty-day time limit of § 2244(b)(3)(D). *Id.* The court noted that the 6th Circuit found that "a statutory time period providing a directive to an agency or public official is not ordinarily mandatory unless it both expressly requires [the] agency or public official to act within a particular time period and specifies a consequence for failure to comply with the provision." *Id*. at *6 (internal quotation marks omitted). The court reasoned that when a statutory period fails to specify a consequence for noncompliance, a court is not deprived of the power to grant the successive motion. *Id.* Thus, the 9th Circuit held that the thirty-day statutory time limit of § 2244 is hortatory, not mandatory, and can be exceeded when a § 2255 petition presents a complex issue. *Id.*

Plea Agreement—Government Withdrawal of Plea Agreement: *United States v. Haynes*, 579 F. App'x 473 (6th Cir. 2014).

The 6th Circuit addressed whether the government must grant an evidentiary hearing when a Rule 35(b) motion is withdrawn. *Id*. at 479. The court noted that the 2nd Circuit had previously held that an evidentiary hearing is appropriate in these circumstances, because of the possibility of a bad faith review. *Id.* at 842. Further, the court noted that the 3rd Circuit held that the standard of review is limited to "unconstitutional motives." *Id*. The 6th Circuit agreed with the 3rd Circuit and concluded that when a plea agreement affords the government "complete discretion" to file a motion for a downward departure, their standard of review is limited to the "unconstitutional motives" standard. *Id*.

REMEDIES

Penalties –Mandatory Victims Restitution Act: *United States v. Kieffer*, 2014 U.S. App. LEXIS 24173 (10th Cir. December 22, 2014)

The 10th Circuit addressed whether restitution under the Mandatory Victims Restitution Act is a criminal penalty, subject to the requirement

that a jury must first consider the evidence before a criminal fine is imposed. *Id.* at *23 – 25. While the 1st and 8th Circuits both found that restitution is a criminal penalty, the 9th Circuit held that it is a criminal penalty only under certain circumstances. *Id.* at *25 – 26. Conversely, the 10th Circuit reasoned that "the purpose of restitution is to restore victims, not punish offenders; therefore restitution may be ordered by a district court without an evidentiary finding made by a jury. *Id.* at *25–26. Thus, the 10th Circuit concluded that "restitution is a civil remedy designed to compensate victims – not a criminal penalty." *Id.* at *25.